IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3790 OF 2004

IN

SUIT NO.1705 OF 2004

Vidyavihar Palm-View Co-op. Hsg. Scty. Ltd. & Another ... Plaintiffs.

vs.

Maharashtra Housing & Area Development Authority and others. .... Defendants.

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Mr.Mohan Rane i/b. M/s.Purnanand & Co., for Plaintiffs

Ms.Geeta Shastri, AGP for Defendant nos.1 & 2.

Mr.R.V.Girkar for Defendant no.3.

**CORAM: D.K.DESHMUKH,J.**

**DATED: 13th January, 2006**

**P.C**.:-

1. This is a notice of motion taken out by the plaintiffs under Order 12 Rule 6 of the Civil Procedure Code for passing decree on admission. The plaintiffs have filed the suit claiming that defendant no.1 which is

a statutory authority through its officer defendant no.2 allotted to the plaintiff no.1 which is a Co-operative housing society, by a registered lease deed dated 19.4.1989 land from C.T.S. no.1268(part). The lease is for a period of 99 years. While this lease is subsisting, according to the plaintiffs, lease of the same land for a period of 30 years on 23.5.2003 has been granted in favour of defendant no.3. According to the plaintiffs, therefore the allotment of the same land in favour of defendant no.3 while the lease granted in favour of plaintiffs is subsisting, is invalid. The plaintiffs submits that this position has been accepted by defendant

nos.1 and 2 in their affidavit dated 26.10.2004 filed in this very suit. The plaintiffs rely on the paragraphs 3, 4 and 5 of that affidavit. Those paragraphs read as under:-

> "3. I say that the brief facts of the case are that the defendant no.1 and 2 had allotted survey No.1268 (Pt) of Ghatkopar, Kirol, admeasuring 5582.187 sq.mt., comprising of the land underneath appurtenant to building No.B-1 and B-4 and strip of land admeasuring 270 sq.mts. The copy of the said indenture is annexed by the Plaintiff as Exhibit to the Plaint at page no.23.

4. I say that the defendant no.3 made an application to the defendant no.2 on 16th August,2001, for allotment of land admeasuring 270 sq.mts. In TPS No.3 bearing CTS No.1268 Ghatkopar, Kirol on permanent free hold basis. The defendant No.3 was originally allotted in 1964, 1965, an area of 803.51 sq.ft from CTS No.1268 (pt), Ghatkopar, Kirol for the purpose of constructing school on the ground rent of Rs.262/- and by the said allotment dated 16th August,2001, they wanted the adjoining plot of land admeasuring 270 sq.mts. The said application was verified by the concerned Land Manager by visiting the site and found that no construction was there and as there was no record or register to show that it has been allotted to anybody, the same was put up by the concerned Land Manager of the Defendant no.1 and 2 to the MHADA Board on 24.6.2002 and after obtaining the sanction of the said Board, it was put up before the MHAD Authority, which comprises of 7 to 8 number of members. The was thereafter

approved by the Authority in the Authority Meeting held on 26.11.2002 and the sanction was given accordingly by the Defendant No.1 and 2 in favour of the Defendant No.3 for the plot of land admeasuring 270 sq.mts. Of 1268 (pt) for the activities of the school after considering the fact that in the Revised Development Plan and as per the Lay Out sanctioned for the said colony under the same was reserved for school. I say that the Defendant No.3 has paid a total sum of Rs.5,98,335/- for the said plot of land, as per the Letter of Allotment given to them bearing No.MB/Land Branch/13/650/03 dated 7th February,2003. I crave leave to refer to and rely upon the copy of the said Letter of Allotment in favour of the Defendant no.3 as and when produced. I say that after the filing of the present suit by the Plaintiff, after going through the files, the Defendant no.1 and 2 found some discrepancies in respect of the allotment as from the record, it appeared that the same plot of land admeasuring 270 sq.mts.

Of CTS No.1268(pt) was allotted in favour of the Defendant no.3. I say that as reflected from the record, that the Plaintiff was the 1st allottee, files have been put up to the concerned authority for cancelling the subsequent allotment in favour of defendant No.3 as the same has been inadvertently done when the same plot has already been allotted by an indenture in 1989 much prior to the allotment to defendant No.3 in favour of the plaintiff. The said process is still pending as the same will be verified by the MHAD Authority/Board as required under the law.

5. I say that in view of the above grievance of the plaintiff to the extent that the defendant no.1 and 2 are not looking into the matter and have not taken any steps in view of the above fact is not correct, as immediately on being brought to the notice of the concerned officer, after verification at site and from the record, the facts have been put up for necessary action by the concerned Authority and the Board. ”

It is clear from the above quoted paragraphs from the affidavit of defendant nos.1 and 2 that firstly the defendant nos.1 and 2 accept that lease of the land from Survey no.1268 (part) Ghatkopar is granted in favour of the plaintiffs. Secondly, it is admitted that the land admeasuring 270 sq.meters from the same Survey no.1268(part) has been allotted by defendant nos.1 and 2 to defendant no.3. Thirdly, it is admitted that same land has been allotted to defendant no.3 during the subsistence of the lease granted in favour of plaintiffs. Fourthly, it is clear from the affidavit that the allotment was made in favour of defendant no.3 by mistake. Fifthly, it is admitted that defendant nos.1 and 2 have initiated process for correction of mistake. Defendant nos.1 and 2 have not filed any affidavit in reply in this notice of motion. The learned Counsel appearing for defendant nos. 1 and 2 also did not dispute the correctness of the averments made in affidavit dated 26.10.2004. The defendant no.3 has also chosen not to file any affidavit in reply in this notice of motion. The learned Counsel appearing for defendant no.3 however submits that it is seen from the Indenture of lease at “Exhibit B” which is in favour of plaintiffs that in that lease deed the land allotted to the plaintiffs was described as a land from CTS nos.1228 to 1259. That lease deed was rectified by rectification deed dated 5.5.1993 and according to the rectified lease the plaintiffs have been allotted land from CTS no.1268(part). However, according

to the learned Counsel the indenture of lease executed in favour of defendant no.3 copy of which is at Exhibit D shows that the land from CTS no.464(part) has been allotted in favour of defendant no.3 and therefore, the land allotted in favour of defendant no.3 is not the land allotted to the plaintiffs but it is some other land. It is true that copy of the lease deed at "Exhibit.D" described the land allotted to defendant no.3 as land from CTS. 464 (part), whereas the Rectification deed at "Exhibit C" shows that the land allotted to the plaintiffs is the land from Survey no.1268(part). But the affidavit filed by defendant nos. 1 and 2 dated 26.10.2004 leaves one in no doubt that the same land which has been alloted to the plaintiffs has been allotted to defendant no.3. If according to defendant no.3 what is stated in that affidavit dated 26.10.2004 is not correct then it was open to defendant no.3 to file affidavit in this notice of motion disclosing that position. The defendant no.3 has chosen not to file any affidavit in this notice of motion. In the absence of any affidavit filed by defendants in this notice of motion, the averments in the affidavit filed in support of notice of motion has to be taken at their face value. The provision of Order 12 Rule 6 of C.P.C. under which this notice of motion has been taken out shows that the Court can pass a decree in favour of plaintiffs where the Court finds that the facts on the basis of which the plaintiffs are claiming a decree are admitted either in the pleadings or otherwise. I find that the facts on the basis of which the plaintiffs claim decree of

declaration declaring that the allotment in his favour is valid and that the allotment of the same land in favour of defendant no.3 is invalid, are clearly admitted by defendant nos.1 and 2 who have made the allotment in favour of plaintiffs.

2. So far as the reliefs claimed under prayer clause (b) of the Suit is concerned, the plaintiffs claim direction to defendant no.1 and 2 to correct the record. It is clear from the affidavit of defendant nos.1 and 2 that they have themselves taken steps to correct the record. In my opinion, therefore, the plaintiffs are entitled to relief as claimed by this notice of motion. The notice of motion is therefore, granted in terms of prayer clause (a). The suit stands disposed of.

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